Circuit Court for Montgomery County
Case No. 06-Z-21-000026

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 40

September Term, 2022

IN RE K.B.

Arthur,
Leahy,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: October 26, 2022

The Circuit Court for Montgomery County terminated a father's parental rights. He appealed.

In his appeal, the father does not directly challenge the circuit's court's factual findings or legal conclusions. Instead, he contends that he did not receive effective assistance of counsel from his court-appointed attorney. We affirm the order terminating the father's parental rights.

FACTUAL BACKGROUND

This case concerns K.B., who was born in May 2015. K.B.'s parents have a long history of domestic violence, which includes protective orders, violations of protective orders, multiple encounters with the police, and several arrests.

On January 3, 2019, after one of many incidents of domestic violence, the local department of social services placed K.B. and his older half-sister in shelter care.[1] At the time, three-year-old K.B. had scars from cigarette burns and from being struck by a belt. He also had seven cavities, suffered from night terrors, was behind on his immunizations, and was still in diapers.

K.B. and his half-sister have been in foster care with the same foster parents since January 7, 2019.

On January 22, 2019, the Circuit Court for Montgomery County determined that

[1] K.B.'s father is not the biological father of K.B.'s half-sister.

K.B. was a child in need of assistance.[2] In reaching that decision, the court found that K.B.'s parents had abused and neglected him and that they were unable and unwilling to give proper care and attention to his needs. The court ordered weekly, supervised visitation between K.B. and his parents. It conditioned Father's visitation on his completion of the Abused Persons Program, which is designed to stop domestic violence in intimate relationships through individual and group counseling.

On September 14, 2019, the police arrested Father for assaulting K.B.'s mother ("Mother"), who was holding her one-month-old child at the time.[3] At the local department's request, Father reluctantly agreed to participate in the Abused Persons Program as an offender and not (as before) as a victim.

Only three days after Father's arrest, he brought Mother with him for a visit with the children. Yet, less than two months later, Father and Mother were fighting again: he accused her of stealing his car, and she accused him of poisoning her food.

At a review hearing on December 18, 2019, the court found that K.B. was not safe with his parents and that it would be "detrimental" to remove the children from their safe foster home and place them in one of "uncertainty, chaos, and violence." The court

[2] The term "child in need of assistance" or "CINA" means "a child who requires court intervention because: (1) [t]he child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2) [t]he child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs." Md. Code (1974, 2020 Repl. Vol.), § 3-801(f)-(g) of the Courts and Judicial Proceedings Article.

[3] It is unclear whether this child is the biological child of Father.

continued the permanency plan of reunification, but ordered Father to complete the Abused Persons Program, which he had not yet done. The court also ordered Father to undergo a psychological evaluation. Visitation continued to be supervised.

Because of the COVID-19 pandemic and its impact on court operations, the next review hearing did not take place until October 27, 2020. During the intervening ten months, Mother and Father continued to have incidents of domestic violence at a rate of about one per month.

At the October 2020 hearing, Father falsely denied that he had had any contact with Mother, except (he said) when she called him to demand money. The court expressed concern about Father's credibility and about Father's pattern of missing visits with K.B. Nonetheless, the court continued the permanency plan of reunification. It did so in part because the pandemic had interfered with Father's opportunity to complete his psychological examination.

Father finally underwent a psychological examination in March and April of 2021. The psychologist, Samantha Bender, Ph.D., diagnosed Father with a narcissistic personality disorder.

At the next review hearing, in July 2021, the court found that Father and Mother had made little to no progress. Mother had obtained a protective order against Father, and Father had been charged criminally with threatening Mother. Father's therapist wrote that Father would repeatedly affirm that he was having no contact with Mother, only to admit later that he was continuing to see her. According to the therapist, Father's "self-report can

no longer be deemed credible."

The court found that the parents were so "focused on blaming each other that neither seems to recognize the seriousness of the damage they have done to these children." Citing the "toxic and violent" relationship between Mother and Father, the court changed K.B.'s permanency plan to adoption by a non-relative.

After the court changed the permanency plan, the local department filed a petition for guardianship with the right to consent to adoption. K.B., through counsel, consented to the petition. Mother eventually consented to the petition, on the condition that K.B. and his half-sister be adopted by their foster parents, with whom K.B. has a strong bond. Father opposed the petition.

The circuit court conducted a remote guardianship hearing over the course of five days in January 2022. Father testified at length. So did the psychologist, Dr. Bender. She opined that Father was unfit as a parent because of his personality disorders, including his lack of empathy, his emotional volatility, his inability to think clearly when frustrated, and his inability to delineate the differences between his needs and the needs of others. Because of his refusal to take responsibility for his actions (an attribute of a narcissistic personality disorder), Dr. Bender opined that Father was unlikely to benefit from therapy.

On March 1, 2022, the circuit court terminated Father's parental rights. In a lengthy written opinion, the court found that Father had admitted to being involved in 31 incidents of domestic violence with Mother over the course of the preceding four years. The court also found that the "pattern of abuse was facilitated by [Father's] inability or unwillingness

to keep [Mother] out of his life" and his failure to accept "responsibility." The court was unpersuaded by Father's claim that he had ended his relationship with Mother, because of his earlier misrepresentations, including misrepresentations to the court itself, about his contact with her. The court credited Dr. Bender's testimony that Father's personality disorder rendered him unfit to raise K.B. and that Father would not benefit from therapy. Even if Father might benefit from therapy, the court observed that progress would take "many years" and that K.B. had already been in foster care for three years. The court found that because of the "omnipresent prospect of continued domestic violence," K.B. "could not be safe" in Father's care, but that he was "safe and well cared for in the home of his foster parents." It noted that in three years Father had not progressed beyond the stage of supervised visitation with K.B.

On the basis of those findings, the circuit court concluded, by clear and convincing evidence, both that Father was unfit to continue in a parental relationship with K.B. and that exceptional circumstances made the continuation of the parental relationship detrimental to K.B.'s best interests.

Father noted this timely appeal.

QUESTION PRESENTED

Father has submitted one question: "Did [Father] receive effective assistance of counsel during the Termination of Parental Rights proceedings?"

Because Father has not established that he received ineffective assistance of counsel, we shall affirm the judgment.

DISCUSSION

In proceedings involving a child in need of assistance, an indigent parent or guardian generally has a statutory right to counsel. *See* Md. Code (1974, 2020 Repl. Vol.), § 3-813 of the Courts and Judicial Proceedings Article ("CJP"). "[I]mplicit in the grant of the right to counsel," whether constitutional, statutory, or otherwise, "is the right to effective assistance of counsel." *See In re Adoption of Chaden M.*, 422 Md. 498, 509-10 (2011); *accord In re J.R.*, 246 Md. App. 707, 757-58 (2020).

To assess whether a parent or guardian has been denied the statutory right to effective assistance of counsel in a CINA case, this Court has adopted the standards that are employed in cases involving the right to counsel under the Sixth Amendment to the United States Constitution. *In re J.R.*, 246 Md. App. at 758. In brief, those standards require the parent or guardian first to show that "'counsel's representation fell below an objective standard of reasonableness.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). The parent or guardian must also show "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. at 689). If the parent or guardian does not satisfy both of these requirements, the claim of ineffective assistance fails.[4]

[4] Father suggests that prejudice is presumed. He is incorrect. In limited circumstances, the Court of Appeals has eliminated the requirement of proof of prejudice. *See, e.g., Duvall v. State*, 399 Md. 210, 234 (2007) (stating that "prejudice is presumed when counsel becomes burdened by the existence of an actual conflict of interest"); *see also Garrison v. State*, 350 Md. 128, 143 (1998) (concluding that "[t]here is no requirement

In criminal cases involving the Sixth Amendment right to counsel, courts must "assume, until proven otherwise, that counsel's conduct fell within a broad range of reasonable professional judgment, and that counsel's conduct derived not from error but from trial strategy." *Mosley v. State*, 378 Md. 548, 559 (2003). Thus, a claim of ineffective assistance is typically made in a post-conviction proceeding, not in a direct appeal from the conviction itself: "'Post-conviction proceedings are preferred. . . because the trial record rarely reveals why counsel acted or omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel's ineffectiveness.'" *In re J.R.*, 246 Md. App. at 759 (quoting *Mosley v. State*, 378 Md. at 560). In criminal cases, this Court may consider claims of ineffective assistance of counsel on direct appeal "only when 'the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim.'" *Mosley v. State*, 378 Md. at 566 (quoting *In re Parris W.*, 363 Md. 715, 726 (2001)).[5]

in a post conviction proceeding that a defendant, seeking a belated appeal from a judgment of the District Court *on the ground of his counsel's failure to file an appeal*, that the defendant timely requested be filed, present evidence from the District Court proceeding to prove that the issue or issues to be presented on appeal are likely to succeed") (emphasis in original). Outside of those circumstances, a party remains responsible to prove prejudice.

[5] For cases in which the Maryland appellate courts have entertained claims of ineffective assistance of counsel on direct appeal, see *Smith v. State*, 394 Md. 184, 201 (2006) (concluding that an ineffective assistance of counsel claim may be heard on direct appeal where the record revealed that counsel, who had a conflict of interest, disclosed an attorney-client communication without a valid waiver from the client); *In re Parris W.*, 363 Md. 717, 727 (2001) (concluding that an ineffective assistance of counsel claim may be heard on direct appeal where the trial record demonstrated that trial counsel had erred by failing to subpoena key alibi witnesses for the correct trial date); *Austin v. State*, 327 Md.

Similarly, in CINA cases involving a statutory right to counsel, it is not our role to second-guess the tactical decisions of trial counsel. *In re J.R.*, 246 Md. App. at 760. Instead, this Court can evaluate a claim of ineffective assistance of counsel only if the parent or guardian has raised the issue at trial (which is, understandably, unlikely to occur) or if the trial record clearly illuminates that counsel's actions were ineffective. *Id*. Those conditions are unmet in this case.

Father complains that his trial counsel made only one objection and did not properly voir dire the department's expert witnesses. Father also contends that his counsel did not call certain expert and fact witnesses. Father argues, therefore, that his counsel failed to articulate his position.

Father, however, has failed to present any specific evidence of where his counsel was ineffective. Although Father argues that his counsel failed to make objections, he offers no citations to the record to show where his counsel should have objected or of where

375, 394 (1992) (concluding that an ineffective assistance of counsel claim may be heard on direct appeal when the trial record sufficiently demonstrated that counsel's conflicts of interest adversely affected his performance); *Testerman v. State*, 170 Md. App. 324, 336 (2006) (concluding that, because no critical facts were in dispute, the trial record was sufficiently developed for an appellate court to decide whether counsel was ineffective in failing to argue that defendant did not "elude" a police officer and thereby failing to preserve this issue for appellate review); *Whitney v. State*, 158 Md. App. 519, 526 (2004) (concluding that an ineffective assistance of counsel claim may be heard on direct appeal where trial counsel had conceded, at trial, that she mishandled voir dire because she was unaware of the number of peremptory strikes to which her client was entitled). For a similar case involving the statutory right to counsel, see *In re Adoption of Chaden M.*, 422 Md. at 513-15 (concluding that the court-appointed attorney for a disabled parent rendered ineffective assistance in failing to file a timely objection to a petition for guardianship that would result in the termination of the client's parental rights).

an objection would have been useful. Furthermore, Father does not articulate what voir dire questions his counsel should have posed to the department's experts or why the experts were unqualified. For all we know, counsel made a reasonable, tactical decision not to undermine his credibility with the court by mounting a futile assault on witnesses who were eminently qualified to testify as experts in their fields.

Father goes on to argue that his counsel should have called his adult children to testify, but he does not explain what the children would have said or how their testimony might have been useful to his case. He also argues that counsel should have called his physicians and introduced some of his medical records from the Department of Veterans Affairs, but he does not identify the physicians whom counsel allegedly should have called; he does not disclose the substance of their anticipated testimony; and he does not specify the medical records that would allegedly have aided his case or mention what the records would say. Without any idea of what the witnesses would say or what the records would show, we have no way to evaluate whether a reasonably competent attorney could have used them to advance Father's interests and no way to evaluate whether Father suffered any prejudice as a result of counsel's alleged failure to use them.

On the basis of Father's arguments, we have no reason to conclude that he received ineffective assistance of counsel. Father has not shown that counsel's conduct fell below an objective standard of reasonableness. Nor has he shown a reasonable probability that, but for counsel's alleged errors, the result at trial might have been different. In short, Father's arguments are nothing more than bare allegations unsupported by any factual basis

in the record.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; APPELLANT TO PAY ALL COSTS.